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OSGOODE HALL REVIEW OF LAW AND POLICY

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COMMENT

IN THE WAKE OF *VIA RAIL*: IMPLICATIONS AND FUTURE
CONSIDERATIONS*

This comment focuses on the Supreme Court of Canada decision in Council of Canadians with Disabilities v. VIA Rail Canada Inc. (2007) and attempts to explore the Court's reasoning in the decision and the subsequent effects that may flow from it. This comment also touches briefly on the recent case of New Brunswick (Board of Management) v. Dunsmuir and the complications stemming from it. The comment concludes that it remains uncertain how these newly developed dynamics from VIA Rail and Dunsmuir will interact with the broader legal and policy forces shaping the duty to accommodate.

When the Supreme Court of Canada released its decision in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*¹ in March of 2007, the majority judgment was hailed as victory for the disabled and, more generally, a development that would “empower human rights activists.”² Practitioners immediately saw the Court’s

* The OHRLP wishes to thank Chris Piggot B.A. (Hons) (Toronto), M.A. (Queen’s), LL.B. Candidate 2009 (Osgoode) for researching and writing this comment. The OHRLP also thanks Stephanie Brown for her editorial assistance and Andrea Siu for her research contributions.

¹ 2007 SCC 15, [2007] 1 S.C.R. 650, 279 D.L.R. (4th) 1 [VIA].

² “SCC’s Via Rail ruling may impact industry: experts” (23 March 2007), online: CTV News

<http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070323/VIA_rail_070323/20070323?hub=CTVNewsAt11>

reasoning, which upheld the Canadian Transportation Agency's (CTA) decision to order VIA Rail to make 40 of 139 "Renaissance" cars wheelchair accessible, as having implications that could reach well beyond the rather limited federal transportation scheme. Indeed, in a popular media interview, counsel for the Canadian Human Rights Commission Leslie Reaume noted that the ruling could have an impact on any issue coming before a federal tribunal and, in particular, "this decision has implications for every administrative adjudicator who is dealing with a human rights issue."³

A year after the release of the decision, *VIA Rail's* impact on administrative decision makers dealing with human rights issues remains elusive. To be sure, the CTA has since demonstrated that it has taken the majority reasons as an affirmation of a strong mandate to consider and apply human rights principles in the course of adjudications.⁴ But, the interplay between public law principles and human rights considerations that Reaume noted could alter administrative decision making in the wake of *VIA Rail* have always been transient; certainly, evidence of the tenuous ground on which the majority reasons stand is apparent in the 5-4 split in the decision.

Notwithstanding the split, the majority opinion should be recognized as a concerted attempt to bring human rights principles to the fore of the administrative process. This is best illustrated by the stark disagreement between the majority and minority in the *VIA Rail* decision over two central issues: the appropriate standard of review to be applied to human rights-related decisions in an administrative setting, and the approach to statutory interpretation and the role of individual administrative tribunals when dealing with human rights legislation.

It is crucial to note, however, that public law has changed dramatically in the twelve months since the Court handed down its judgment. For example, the *Dunsmuir*⁵ decision's wrenching modification to the law of judicial review in Canada should be viewed as a particularly worrisome development to those who see *VIA Rail* as a powerful tool in the human rights activist's toolbox. Certainly, *VIA Rail's* unquestionable ambition is now laden with potential failings.

³ *Ibid.*

⁴ *Canadian Transportation Agency Decision No. 6-AT-A-2008*, (2008) at para. 100.

⁵ *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 [*Dunsmuir*].

Much of the potential impact of *VIA Rail* for human rights law and policy flows from what are, ostensibly, changes to the substantive review methodology in the majority judgment. There, Abella J. deviates from the conventional view that administrative decisions that have the effect of applying human rights principles in adjudicating disputes—which, therefore, are questions of law within the relative expertise of courts—are subject to a non-deferential standard of correctness in judicial review.

This principle is longstanding in Canadian administrative law⁶ and, indeed, the minority treats this principle as a given. In their dissent, Deschamps J. and Rothstein J. argue that holding to this precedent is particularly important here: the CTA’s determination of the particular human rights principles applicable within the statutory scheme—across the federal transportation context—had not been either adjudicated or scrutinized judicially, giving the decision precedential value with a potentially pervasive legal effect.⁷ The minority’s method, then, is unremarkable: it simply reflects the Court’s usual reliance on the pragmatic and functional approach jurisprudence since *Pushpanathan*.⁸

In contrast, the majority’s analysis is novel. In broad strokes, Justice Abella’s approach represents a dynamic view of the interaction between human rights “law” and administrative mechanisms, resulting in a rather dramatic movement towards judicial deference and flexibility in substantive review.

The concern driving the majority approach here is a seeming frustration with the growing complexity in substantive review, and especially with respect to various courts’ inclination to segment and thereby limit a tribunal’s jurisdiction through an overly rigorous application of the pragmatic and functional approach. Certainly, much of the most pointed language in the majority decision is reserved to attack the recent trend towards the application of multiple

⁶ See e.g. *Trinity Western University v. College of Teachers (British Columbia)*, 2001 SCC 31, [2001] 1 S.C.R. 772 at 805.

⁷ *VIA*, *supra* note 1 at para. 282.

⁸ *Pushpanathan v. Canada (Minister of Employment and Immigration)*, [1998] 1 S.C.R. 1222, 11 Admin. L.R. (3d) 130 [*Pushpanathan*].

standards of review to different parts of a tribunal's decision.⁹ In *VIA Rail*, this differential standard approach was adopted at the Federal Court of Appeal, where two judges of the three-judge panel ruled that while the CTA determination of undue obstacles must be reviewed under a standard of patent unreasonableness, a jurisdictional question raising human rights issues should be subject to a correctness standard.¹⁰

The response by Justice Abella to the lower court on this issue is emphatic:

It seems to me counterproductive for courts to parse and recharacterize aspects of a tribunal's core jurisdiction, like the Agency's discretionary authority to make regulations and adjudicate complaints, in a way that undermines the deference that jurisdiction was conferred to protect...I do not share the view that the issue before the Agency was, as a human rights matter, subject to review on a standard of correctness. This unduly narrows the characterization of what the Agency was called upon to decide and disregards how inextricably interwoven the human rights and transportation issues are.¹¹

Abella J.'s purposive conception of statutory authority leans toward the view of judicial deference taken by Justice Bertha Wilson in dissent almost two decades ago, when the tension between the "rule of law" approach and administrative prerogatives was still youthful in Canadian public law. In *National Corn Growers*, Wilson J. argued that judicial scrutiny should only extend to determining whether or not "the Tribunal [is] dealing with the kind of issue that it was set up to deal with" under a standard of patent

⁹ Interestingly, this decision was released only one day after *Lévis (Ville) c. Côté*, 2007 SCC 14, [2007] 1 S.C.R. 591, 278 D.L.R. (4th) 577, where the Court held that it was appropriate to use multiple standards of review.

¹⁰ *Council of Canadians with Disabilities v. VIA Rail Canada Inc.* 2005 FCA 79, 251 D.L.R. (4th) 418, rev'd 2007 SCC 15, [2007] 1 S.C.R. 650, 279 D.L.R. (4th) 1. More specifically, this question concerned the ability of the CTA to exercise its regulatory authority under *Canada Transportation Act*, S.C. 1996, c. 10, s. 172 [CTA] in response to a complaint application that did *not* result from "actual travel experience"; *VIA*, *supra* note 1 at para. 74.

¹¹ *VIA*, *supra* note 1 at paras. 96-97.

unreasonableness.¹² This formulation would have seemed to establish a “black box” approach under patent unreasonableness review, which—*after* determining whether a tribunal’s enabling legislation allowed it to consider a broadly defined issue area—would require a reviewing court to accord the tribunal almost absolute deference.¹³

In *VIA Rail*, the majority leans toward absolute deference when framing their approach. Part V of the *CTA* gives the tribunal a broad investigative and regulatory jurisdiction to cope with obstacles to accommodation in the federal transportation context that are, in Justice Abella’s words, “interwoven” with a variety of legal and policy issues.¹⁴ Following from this analysis, the difficulty and indeterminacy that the majority notes are inherent in the untangling of these elements push substantive review towards an area where an additional focused scrutiny—an addition to an otherwise highly deferential approach—will be inappropriate. If the Court continues in this vein in situations of judicial review, the ability of expert policy tribunals to make a broader range of factual and legal determinations free from strict oversight will be greatly enlarged.

Outside the purview of judicial review and within the framework governing the use and interpretation of legislation by tribunals, *VIA Rail* marks the judicial acceptance of a newly robust role for a wider variety of statutory decision makers in the human rights policy process.

As the majority in *VIA Rail* notes, this acceptance is driven in part by the emerging recognition by courts that administrative tribunals should be allowed to stray from their enabling statutes when interpreting and applying their constituting legislation, and especially when considering issues with human rights implications. For our purposes here, the crucial affirmation of this principle was given in *Tranchemontagne*, where the majority held that there is a rebuttable presumption that a statutory tribunal has the jurisdiction to consider

¹² *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.L.R. (4th) 449, at para. 106 Wilson J [*National Corn Growers*].

¹³ *Ibid.* Much of Wilson’s approach seems to be explicitly adopted by the majority at paragraph 104 in *VIA*. Judicial ratification of this vision of patent unreasonableness is belied, however, by the majority’s extensive review of the CTA’s processes and conclusions in the decision—an investigative process that more closely mirrors the majority judgment that Wilson was protesting against in *National Corn Growers*.

¹⁴ *VIA*, *supra* note 1 at para. 97.

statutes outside of its enabling legislation in order to fulfill its mandate.¹⁵ This concept builds on the administrative law jurisprudence emerging since *Martin*, where the Court held that tribunals can consider and apply constitutional principles in conjunction with issues arising in their adjudicative capacity.¹⁶ Chief Justice McLachlin's concern in *Martin* mirrors the sentiment underlying the majority reasons in *Tranchemontagne*:

...it is undesirable for a tribunal to limit itself to some of the law while shutting its eyes to the rest of the law. The law is not so easily compartmentalized that all relevant sources on a given issue can be found in the provisions of a tribunal's enabling statute.¹⁷

This strand in the jurisprudence endorses the argument that administrative tribunals now have a broad plenary jurisdiction to consider outside legislation (subject to legislative exception) in carrying out their specific statutory mandates. The broad effect of this is to undermine the existence of administrative structures as compartmentalized policy actors and encourage a functional overlap; in the instant case, for example, it was held that an agency conceived for the regulation of federal transportation services acted lawfully in carrying out a function traditionally monopolized by a human rights tribunal.

What is novel in *VIA Rail* with respect to the admittance of myriad tribunals to the arena of human rights, however, is the movement in the Court towards an "aspirational" form of statutory interpretation that has the duty to accommodate as a central concern. In *VIA Rail*, this had the effect of pushing the goal of elevating human rights principles closer to the center of these diverse tribunals' adjudicative processes. This is particularly evident in the decision's

¹⁵ *Tranchemontagne v. Ontario (Director, Disability Support Program)* 2006 SCC 14, [2006] 1 S.C.R. 513, 266 D.L.R. (4th) 287 [*Tranchemontagne*].

¹⁶ *Martin v. Nova Scotia (Workers' Compensation Board)* 2003 SCC 54, [2003] 2 S.C.R. 504, 4 Admin. L.R. (4th) 1 [*Martin*]. Interestingly, the majority in *Martin* noted that constitutional "questions" decided by a tribunal would be subject to judicial review on a correctness standard.

¹⁷ *VIA*, *supra* note 1 at para. 114, citing from *Tranchemontagne*, *supra* note 13 at para. 26.

varied treatment of s. 5 of the *CTA*,¹⁸ where the majority's use of a very loose interpretive framework stands in stark contrast to the minority's close textual reading.

As noted above, s. 5 of the *Act* is a declaratory provision outlining the Act's *National Transportation Policy*, which states a number of goals that govern the regulatory framework underlying the federal transportation system.¹⁹ These goals include, for example: safety, the preservation of market forces and competition in the system, the flow of commodities, and, of course, the duty to accommodate the disabled.

The minority decision situates the duty to accommodate disabled persons among the other enumerated duties in s. 5. Indeed, their judgment in favour of VIA Rail hinges in part on the ruling that the tribunal erred in law by being "dismissive" in their consideration of the costs of refurbishing the cars.²⁰ Put another way, the CTA failed to adequately balance the interests protected in s. 5 by placing disproportionate weight on the duty to accommodate even though the legislature plainly intended that they exist alongside each other.

The minority further dilutes the potential strength of the provision as a tool for disability concerns by noting the presence of two explicit "limiting" functions within s. 5. The minority points first to s. 5(g) of the *Act*, which has the effect of stating that carriers accommodate persons with disabilities "as far as is practicable."²¹ They argue that such a use of this phrase denotes that the legislature intended "that the objectives are not expected to be achieved to the level of perfection."²² The second limitation is the use of the adjective "undue" prior to the word "obstacle" in s.5 (g)(ii) itself. For the minority, "the mobility of persons may be subject to obstacles, but the objective of the Policy is that mobility not be impeded by *undue* obstacles."²³

This restrictive interpretation is diametrically opposed to the majority's highly liberal perspective of how the statute must be read. As the basis for this interpretation, the decision draws on the

¹⁸ *Supra*, note 9.

¹⁹ *Ibid.*

²⁰ *VIA, supra* note 1 at para. 354.

²¹ *VIA, supra* note 1 at para 290.

²² *Ibid.*

²³ *Ibid.*

legislative history of the *CTA*,²⁴ as well as the directive in s. 171 that requires the *CTA* to “coordinate” its activities and policies with the Canada Human Rights Commission, in order to assert that the act is human rights legislation; the *CTA*, therefore, enjoys quasi-constitutional status that allows it to supercede other legislated policy concerns.²⁵

The conclusion that the *CTA* has significant human rights content is not remarkable *per se*; indeed, the minority decision agrees with the majority that the extent to which an “obstacle” is “undue” must be established using the *Meiorin* test.²⁶ The test governs reasonable accommodation in labour and employment law²⁷ and, in *BC (Superintendent of Motor Vehicles) v BC (Commissioner of Human Rights)*,²⁸ was deemed the applicable test for most human rights disputes involving accommodation issues. At the very least, then, both sides of the Court understand this dispute as human rights adjudication that necessitates importation of principles and law originating outside of the relevant statute.

The novelty of *VIA Rail* lies in the impact the conflation of the *CTA* and human rights principles broadly has on the majority’s method of statutory interpretation. While the presence of human rights principles *inform* the minority’s analytical framework, they *determine* the majority approach. Indeed, the majority differs fundamentally from the minority in the analysis of s. 5: rather than seeing the s. 5 assertion of a duty to accommodate as simply one enumerated factor among many, the majority treats it as the central and, arguably, the sole concern in the provision.

This determination is evidenced in two ways, both of which mark divergences from the minority opinion. Unsurprisingly, given the assumption stated above, the majority treats the s. 5 goals other than the accommodation of disabilities not as distinct considerations, but rather as factors that should be considered when determining whether or not removing an obstacle would represent an “undue

²⁴ *Ibid.* at paras. 112, 113.

²⁵ *Ibid.* at paras. 115-116

²⁶ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868, 181 D.L.R. (4th) 385.

²⁷ *Ibid.* at para. 296.

²⁸ *Supra*, note 26.

hardship” for a carrier.²⁹ This standard, as noted above, is the central consideration in the third branch of the *Meiorin* test, which arises directly in the context of s. 5(g)ii of the *CTA*. As a result, the majority’s reading of the National Transportation Policy reduces seemingly distinct and equal clauses within the provision to mere considerations that arise only within the paramount duty to accommodate contained in s. 5(g)ii.

Also notable is that the majority ignores the use of the limiting phrase “as far as is practicable” in s. 5(g). Abella J. argues that the phrase is only “the statutory acknowledgement of the ‘undue hardship’ standard in the transportation context.”³⁰ Problematically, however, both the minority and majority agree that the *Meiorin* test arises from and is to be applied specifically in conjunction with the s. 5(g)ii “undue obstacle” analysis. Considering this, the construction of the statute seems to render the “practicability” qualifier in s. 5(g) distinct from the “undue obstacle” analysis required by s. 5(g)ii. As alluded to above, this bifurcated approach could require that *two* balancing tests be undertaken in establishing whether a carrier has a s. 5 responsibility to accommodate disabled persons. The first hurdle would be the “undueness” test in the application of *Meiorin* in s. 5(g)ii; the second would require that—even if it were established that an obstacle to access was not justified under *Meiorin*—the obstacle would still only have to be removed if it were “practicable” for the carrier to do so under s. 5(g). Obviously, by reading s. 5(g) and s. 5(g)ii as coterminous, the majority abandons this latter bar to finding a positive duty to accommodate; in doing so, the decision effectively denies that s. 5(g) could have legal effect.

Of course, the standard of proof that carriers must satisfy in justifying the presence of barriers to access is markedly higher under this interpretation, which is very much in line with the notion noted above “that where there is a conflict between human rights law and other specific legislation, unless an exception is created, the human rights legislation...must govern.”³¹ This statement serves as a concise judicial summary of the disparate developments in the public law

²⁹ *VIA*, *supra* note 1 at para. 135.

³⁰ *Ibid.* at para. 137

³¹ *Ibid.* at para. 115.

jurisprudence that is pushing human rights to the forefront in the administrative decision-making process.

CONCLUSIONS

It remains uncertain how these dynamics will interact with broader legal and policy forces shaping the duty to accommodate. When considering the courts, for example, it is widely accepted by scholars that the duty to accommodate has wrought a significant transformation on the way employers and service providers must interact with disabled persons, but the specific content of that duty—in other words, how courts determine that content—remains very unclear.³² Michael Lynk has recently noted that this has to do with numerous factors, first among which is the inattention common law courts have paid to the duty to accommodate relative to human rights tribunals.³³ A crucial result of this, Lynk argues, is that judges have not come to terms with a unified application of the *Meiorin* test when assessing whether a duty does exist within a specific relationship; instead, individual decisions have tended to focus on specific factors within the three-factor test to the exclusion of others.³⁴ This is obviously a highly problematic methodology, as it results in many possible interpretations of *Meiorin* rather than a single, governing set of applicable principles. Currently, the Supreme Court has reserved judgment on this issue (among others) in *Keays v Honda*; it seems, then, that the common law dispute is ongoing.

More important are developments in public law over the past year that could affect the application of the duty to accommodate—by

³² For a comprehensive account of these issues, see Michael Lynk, “Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in the Canadian Workplace,” in *Law Society of Upper Canada 2007 Special Lectures: Employment Law* (Toronto: Irwin Law, 2008) 189 [Lynk, “Transformation”].

³³ See *ibid.* at 193, 244.

³⁴ *Ibid.* at 253-254. Here, Lynk focuses specifically on the decision at the Ontario Court of Appeal in *Keays v Honda*, (2006) 82 O.R. (3d) 161, 274 D.L.R. (4th) 107 in which the majority effectively applied only the second step of *Meiorin*—the “good faith” test—in assessing whether an employer had failed to accommodate an employee. It is also worth noting that *VIA* dealt in passing with this sort of issue. There, the minority explicitly drew attention to general uncertainty surrounding the application of *Meiorin* by noting that the majority seemingly failed to strictly apply the first two steps of that test in their analysis. See *VIA*, *supra* note 1 at para. 367.

way of the underlying principles and processes governing it—as envisioned by the Court in *VIA Rail*.

With respect to the statutory scheme, the *CTA*, and with it, the National Transportation Policy, was amended with the passage of Bill C-11 several months after *VIA Rail* was released in March 2007.³⁵ The structural effect of the amendments has been to reword the declaration in s. 5, and to condense enumerated principles following that declaration to five contained in subsections s. 5(a) – (e). For the purposes of this essay, the significant differences from the previous incarnation of the *CTA* are that s. 5 now contains no reference to “disability” in the initial declaration, and the reference to “practicability” in what was formerly s. 5(g) has been removed. It is thus far unclear how these statutory changes will affect the duty to accommodate in federal transportation as understood by the Court in *VIA Rail*, if they do at all. Indeed, it could be argued that the amendments codify the majority’s reading of s. 5 by abandoning a “practicability” statement; it is possible that courts would see this as an affirmation of the decision, rather than a legislative change necessitating a judicial one.

What the amended version of s. 5 underscores, however, is that any emerging duty grounded in part by a specific statute—and especially one as seemingly innocuous and uncontroversial as the *CTA*—is potentially subject to summary modification by legislatures. Of course, this basic fact of the public policy process will not necessarily affect the principle of accommodation positively or negatively; it merely illustrates the inherent fluidity and indeterminacy of the duty in the federal transportation context, and others similar to it.

It is probable that dramatic changes made to the substantive review process by the Court will have a much greater impact on the application of the duty to accommodate than any modification to the statutory scheme. While it is too early to assess even the preliminary

³⁵ Bill C-11, *An Act to Amend the Canada Transportation Act and the Railway Safety Act and to make consequential amendments to other Acts*, 2007, (Royal Assent received 22 June 2007). It is also important to note that the legislative history indicates that the amending process was largely over by the time *VIA Rail* was decided. As a result, it is not likely that the Court’s decisions on accommodation issues had a significant impact on the amendments made to s. 5; this argument is reinforced by Parliament’s decision to leave Part V of the *CTA* unchanged.

impact of the *Dunsmuir* case's abandonment of the standard of patent unreasonableness, this development could affect how statutory decisions makers and the courts "supervising" them intervene in human rights disputes.

Certainly, the impact of *Dunsmuir* will be widespread and is not specific to accommodation issues or human rights law alone; rather, it will affect all administrative decisions simply because the courts will have to redefine the concept of reasonableness in light of the Supreme Court's conclusion "that the two variants of reasonableness review [formerly reasonableness and patent unreasonableness] should be collapsed into a single form of 'reasonableness' review."³⁶ While the Court does note that they do not intend for judicial review to become "more intrusive"³⁷ as a result of *Dunsmuir*, they emphasize that "the concept of 'deference as respect'" requires of the courts "submission but respectful attention to the reasons offered or which could be offered in support of a decision."³⁸

As a result, *Dunsmuir* can be understood in the short term as a huge complication of the existing law of judicial review in Canada. *Dunsmuir* requires the conflation of levels of judicial deference that the Court had purposefully and laboriously kept separate for years; the above quoted principles of deference enunciated in *Dunsmuir* will not prevent a period of confusion in lower courts as to how they are supposed to approach decision makers that are just beginning to grapple with human rights issues. This forces any potential developments in the nexus between judicial review and the duty to accommodate into a jurisprudential holding pattern. In the immediate future, it is possible and even likely that rather than follow Justice Abella's notional trajectory toward Justice Wilson's highly deferential dissent in *National Corn Growers*, courts may read *Dunsmuir* as partial rejection of the ever-increasing deference enjoyed by administrative tribunals. This could significantly hinder tribunals' ability to take the leading role in human rights adjudication envisioned for them in *VIA Rail*.

³⁶ *Dunsmuir*, *supra* note 5 at para. 45.

³⁷ *Ibid.* at para 48

³⁸ *Ibid.* quoting from David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M. Taggart, ed., *The Province of Administrative Law* (1997), 279 at 286.